To: Advice File, No. M-13-134

From: Scott Hallabrin, Commission Counsel
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Subject: Analyzing whether an entity is an "agency" under the Political Reform Act (the "Act")[1] and whether individuals working for the entity are "public officials"/"designated employees" subject to the Act.

Date: July 11, 2013

We have been asked to provide a summary of the analytical steps to apply when making a determination of whether an entity is an "agency" under the Act and whether individuals working for the entity are "public officials" or "designated employees" subject to the Act.

Background

Under the Act, each "public official," generally defined in Section 82048 as "every member, officer, employee or consultant of a state or local government agency," is prohibited from making, participating in making or using his or her official position to influence a government decision in which the official has a financial interest. (Section 87100.) Each public official, depending on whether he or she is working for a state or local agency, is also subject to other provisions of the Act such as Section 87104 (representing another person before own state agency), Sections 87400 through 87405 ("switching sides" after leaving state agency), Section 87407 (participating in government decisions affecting a future employer), and 87460 (making loans to high-ranking public officials in own agency).

The Act also requires each state and local government agency to adopt a conflict of interest code (see Sections 87300 – 87314) that lists the job classifications within the agency in which agency members, officers, employees or consultants make or participate in government decisions having reasonably foreseeable material financial effects.[2] An agency's conflict of interest code must be approved by the agency's code reviewing body (Section 87303; the term "code reviewing body" is defined in Section 82011), which also is responsible for determining at what point a subdivision of a larger agency should instead be classified as an "agency" itself that must adopt its own code (Section 87301). Thus, in some cases, the code reviewing body may determine that a body such as a committee or board that operates under the aegis of a larger governmental agency is not a separate agency but part of the larger agency and its officers and employees therefore possibly subject to filing under the larger agency's conflict of interest code. Officials whose positions are designated in the code are known as "designated employees" (see

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[1] Government Code Sections 81000 - 91014. All statutory references are to the Government Code unless specified otherwise. Commission regulations appear at Title 2, Sections 18109-18997, of the California Code of Regulations. All references to regulations are to Commission regulations unless specified otherwise.

[2] Section 87200 also contains a list of positions at the highest levels of state and local government. Individuals occupying these positions are required to file Statements of Economic Interests under the highest level of disclosure independently of their agency's conflict of interest code. (See Sections 87200 - 87210.)

Sections 82019 and 87302). Designated employees are required to periodically file Statements of Economic Interests (FPPC Form 700) providing public information regarding their interests that could reasonably be affected by the governmental decisions they make or in which they participate. Each agency conflict of interest code is required to be tailored so that designated employees only disclose financial information that is pertinent to their government decisionmaking. (Section 87302(a).)

Agency designated employees are subject not only to all of the Act's requirements applicable to "public officials" (see above), but also to the Act's one-year "revolving door" restrictions (see Sections 87406 – 87406.3) and restrictions on the receipt of honoraria and gifts (Sections 89501- 89506).

At times, the Commission is confronted with determining whether particular entities that, although organized under laws applicable to private organizations such as under Section 501(c) of the Internal Revenue Code, appear to be performing government functions and are therefore government agencies, and their officers and employees public officials and designated employees, for purposes of the Act. The analytical steps outlined below are intended to be of assistance in making this determination.

Analytical Steps

1. Determine whether the entity clearly falls under the Act's definition of "state agency" in Section 82049 or "local government agency" in Section 82041 or is clearly part of a state or local government agency.

The Act defines the term "agency" as "any state agency or local government agency." (Section 82004.)

Section 82049 defines "state agency" as "every state office, department, division, bureau, board or commission, and the Legislature."

Section 82041 defines "local government agency" as "a county, city or district of any kind including a school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing."

Where issues have arisen concerning whether an entity is an agency, many of our advice letters simply apply these definitions and make a conclusion based only on the definition itself. The types of entities these letters find to be agencies, or acting as part of a larger agency, seem to fall into two categories:

a. Entities Created by Law to Perform a Clear Governmental Function

In many cases, the Commission has concluded that an entity meets the definition of "state agency" or local government agency" simply by virtue of its creation by law and its functioning like any other governmental agency. This has been the case for joint powers authorities (see *Crabb* Advice Letter, No. A-97-575 and *Weiss* Advice Letter, No. A-01-122), which, under specific statutory requirements, can be formed by government agencies to perform certain

government-related functions. (See Section 6500 et seq.) Also, in addition to the advice letters on joint powers authorities, all of the other advice letters reaching this conclusion seem to contain the following common thread: (1) The entity is either created directly by statute or created by another government entity as required or authorized by statute; (2) The entity operates with funds either budgeted directly through a government agency or raised in the form of taxes or fees determined and levied by a government agency; and (3) The entity performs a function that serves another government agency or a broad public interest. (See *Crabb* and *Weiss*, supra; *Alperin* Advice Letter, No. I-94-177; *Weaver* Advice Letter, No. A-203-225; and *McGie* Advice Letter, No. I-06-207.)

In its formal opinion in *In re Vonk* (1981) 6 FPPC Ops. 1, the Commission concluded that the State Compensation Insurance Fund was an agency subject to the Act because of its establishment in the California constitution. [3] Some advice letters, such as *Weaver*, supra, seem to suggest that the same analysis can be applied to entities created by statute; that is, that the mere creation by statute makes the entity a government agency. However, both the *Vonk* opinion and *Weaver* letter discuss other factors that seem to contribute to the ultimate conclusion that the entity is a government agency. Therefore, factors other than just statutory creation of the entity should be considered before concluding the entity is a government agency.

b. Entities that Clearly Operate as Part of a Government Agency

Certain types of entities, while not directly created by law, nevertheless clearly operate as part of an agency and perform governmental functions on behalf of the agency. For example, a committee of unpaid private individuals formed by a government agency to make recommendations to that agency is a governmental entity. In these types of situations, the agency or its code reviewing body must determine if members of the committee make or participate in governmental decisions and therefore have to file Statements of Economic Interests under either that committee's own conflict of interest code or that of the agency itself. (See discussion under "Background" above.) Regulation 18701(a)(1), discussed under 4. below, provides guidance in determining whether individuals serving on these types of agency-formed committees, boards or commissions are public officials and designated employees under the Act.

If there is doubt about whether the entity clearly falls within the Act's definitions of "state agency" or "local government agency" or otherwise operates as part of an agency, apply the *Siegel* test described in 2. below.

2. <u>If the entity does not clearly fall under the Act's definitions of "state agency" or "local government agency" or operate as part of an agency, determine whether the entity is still a government agency under the *Siegel* Opinion.</u>

[3] On this point, the Commission said: "Indeed, it seems to us that criteria necessary to determine when private entities become so suffused with attributes of sovereignty as to be considered public in nature, are simply not necessary to determine whether an entity specifically authorized by the state constitution is a public agency. In the case of the Fund, we believe its constitutional provenance makes it absolutely plain that the Fund is public in nature." (*In re Vonk*, supra.)

The Commission's formal opinion in *In re Siegel* (1977) 3 FPPC Ops. 62 provides additional guidance for analysis of whether a private entity is essentially acting as a state or local government agency for purposes of the Act.

Siegel established the following four criteria to determine whether a private entity was essentially acting as a state or local government agency and thus subject to the provisions of the Act:

(1) Whether the impetus for formation of the entity originated with a government agency.

(2) Whether the entity is substantially funded by, or its primary source of funds is, a government agency.

(3) Whether one of the principal purposes for which the entity was formed is to provide services or undertake obligations that public agencies are legally authorized to perform and which, in fact, they traditionally have performed.

(4) Whether the entity is treated as a public entity by other laws.

The subsequent Commission opinion in *In re Vonk*, supra, stated that the *Siegel* factors were not intended to be a definitive litmus test for determining whether an entity is public for purposes of the Act. Ultimately, the Commission said, the test is a factual analysis on a case-by-case basis. Thus, on this basis, Commission advice letters have concluded that an entity could qualify as a government agency under the Act even if it met some, but not all, of the four *Siegel* criteria. (See, e.g., *O'Shea* Advice Letter, No. A-91-570 and *Rasiah* Advice Letter, No. A-01-020.)

If the entity is not a government agency and does not operate as part of an agency under 1. or 2., it does not have to adopt a conflict of interest code and individuals who work for the entity, unless they otherwise qualify as "consultants" (see 4. below), are not public officials or designated employees of an agency and the analysis would stop at this point. However, if the entity is a government agency or does operate as part of an agency under 1 or 2, continue the analysis.

3. Assuming the entity is a government agency under 1. or 2. above, next determine if it is exempt from adopting a conflict of interest code under Regulation 18751.

As discussed above, there are situations in which an entity could meet the definition of "state agency" or "local government agency" but, because it operates under the aegis of a larger agency, the entity's officers and employees are required by the agency's code reviewing body to file Statements of Economic Interests under the larger agency's conflict of interest code rather than the entity adopting its own code. **If that is the case, then there is no issue about the entity adopting a code. The only issue in that case is whether the officers and employees of that entity are public officials and designated employees under the Act. See 4. below for a discussion of Regulation 18701(a)(1) and its applicability in determining whether members of certain types of advisory committees, boards or commissions are public officials and designated employees.**

However, when an entity meets the definition of "agency" and generally would be required to adopt its own code, Regulation 18751 provides procedures by which agencies that meet certain criteria can obtain an exemption from having to adopt a code. **If an agency meets the criteria in this regulation and follows the outlined procedures, it will be exempt from having to adopt a code. See the provisions of Regulation 18751 for details. However, if the agency is not exempt under the regulation, it will have to file a conflict of interest code unless none of its officers or employees meets the definition of "designated employee." If the agency is a committee, board or commission, refer to Regulation 18701(a)(1) in 4. below to make this determination.**

4. Assuming the entity is a government agency under 1. or 2. above, the exemption in 3. above does not apply and the entity is thus required to adopt a conflict of interest code, determine whether individuals working for the entity are "public officials" and "designated employees" under the Act?

Generally, if an entity is found to be a government agency, its members, officers, employees and consultants are public officials, and possibly designated employees, under the Act and they are subject to the provisions of the Act discussed under "Background" above.

Special issues arise, however, for individuals who work for agencies as "members" or who do work for agencies as "consultants.

a. "Members." Under Regulation 18701(a)(1), a "committee, board or commission" is deemed to have governmental decisionmaking authority, and its members are thus public officials and designated employees under the Act, whenever:

(1) It may make a final governmental decision;

(2) It may compel a final governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

(3) It makes substantive recommendations that are, or over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

Even though Regulation 18701(a)(1) is not explicit on this point, we think an important premise of this provision is that the committee, board or commission under consideration is a government agency in the first place. The situation the regulation is designed to address is one in which the committee, board or commission has been formed by a public agency and is acting on behalf of that agency – and, thus, whether members of that entity thereby become public officials and designated employees because of the authority given to them by that agency. Therefore, Regulation 18701(a)(1) does not come into play unless the entity first meets the tests for government agency under either 1. or 2. above.

b. "Consultants." The definitions of "public official" in Section 82049 and "designated employee" in Section 82019 both include "consultants" in addition to agency members, officers and employees. This indicates that an individual, even though working strictly in a private

capacity, can work under a contract with an agency and perform a certain level of work that effectively makes that individual the equivalent of an agency employee. Regulation 18701(a)(2) defines which individuals fall within this definition, providing that an individual is a "consultant" and thus a public official and designated employee under the Act if, pursuant to a contract with a government agency, he or she:

(1) Makes specified types of government decisions (see Regulation 18701(a)(2)(A)); or

(2) Serves in a staff capacity with the agency and in that capacity participates in making a government decision or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's conflict of interest code (see Regulation 18701(a)(2)(B)).

There are numerous advice letters that address issues raised under the "consultant" regulation, particularly concerning when an individual under contract with an agency "serves in a staff capacity" as required in Regulation 18701(a)(2)(B). Consult these letters for a thorough analysis of this issue.